

## ON OUR OWN TERMS: EQUALITY AND THE SOCIAL MEANING OF BODIES

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**My overall project:** I offer the first workable theory of what gender is and how it works that both readily translates into much-needed frameworks for analyzing (trans)gender equality rights in constitutional law and does so in a way that begins with trans people's lived material realities from the ground up.

This breaks away from a prevailing trans-inclusive feminist approach which primarily seeks to retrofit trans experiences into dominant conceptual frameworks and social institutions.

*Trans-inclusive feminism:* Starts with cis people and then tags on *gender identity* to “include” trans people in the substantively unaltered framework of an otherwise cis-centric theory.

*(Radical) trans feminism:* Starts with how trans people do gender on trans people's own terms and has no inclusion problem (lesson from theorizing of intersectional discrimination in law).

I argue that an adequate analysis of transgender equality in particular and gender equality more broadly must take seriously *both* the gender (the social metaphysics) *and* the equality (the political philosophy) of gender equality, not just one or the other.

Few theorists today approach trans equality meaningfully in gender equality terms. Some are wary of the *gender* in transgender equality, cautioning that an exact definition and metaphysics of gender may be orthogonal, if not counterproductive, to the politics of trans liberation.

Others steer clear of gender *equality*, invoking instead gender-neutral conceptions of autonomy, freedom from external constraints, and the principle that like cases should be treated alike.

Still more worry that it would threaten the very idea of *women's* rights to include trans people in feminist theory and politics, pitting transgender equality against gender equality.

Unusually for current feminist theory, my argument is one of *explanatory power*. My concern is not the “inclusiveness” of language per se but the work that gender does in explaining a wide range of data points from social oppression to relational dynamics to individual experience.

PART I: LAW & PHILOSOPHY (*Justice, Misgendered: Constructing Gender/Equality in American Law*)

**The neutral application loophole:** Neither pregnancy nor trans discrimination implicates constitutional requirements of gender equality under U.S. law.

There is no *discrimination* based on gender if no men become pregnant. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

There is no discrimination based on *gender* if trans people can be any gender. *United States v. Skrmetti* (“*Skrmetti II*”), No. 23-477 (U.S. June 18, 2025).

*The sameness–difference conception:* Gender equality = lack of sex discrimination = lack of differential treatment unjustified by real underlying sex differences.



- a) Differential treatment, where justified by real underlying differences, is perfectly consistent with the requirements of equality  $\Rightarrow$  the *equal application defense*.

“The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.” *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

“The laws regulate sex-transition treatments for all minors, regardless of sex. Under each law, no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another.” *L.W. v. Skrametti* (“*Skrametti I*”), 83 F.4th 460, 480 (6th Cir. 2023), *aff’d sub nom.* *United States v. Skrametti*, No. 23-477 (U.S. June 18, 2025).

- b) When the justification works too well, differential treatment can be itself justified out of existence  $\Rightarrow$  the *unique application defense*.

“The lack of identity between the excluded disability [i.e., pregnancy] and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974).

“By the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a ‘lack of identity’ between transgender status and the excluded medical diagnoses.” *Skrametti II*, slip op. at 17–18.

My diagnosis: The neutral application defense is not a misapplication of the sameness–difference conception, as sympathetic courts and advocates have attempted to show, but its *reductio ad absurdum*.

To overcome the neutral application defense, we must challenge *both* the social metaphysics of gender *and* the political philosophy of discrimination implicit in the sameness–difference conception.

A workable alternative is unavailable under the framework of mainstream gender equality law but is made possible by conceptual and analytical resources from trans feminist philosophy.

Chapter 1, “Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination” (*Signs* 50.3, Spring 2025), takes on pregnancy discrimination by repurposing and reclaiming the MacKinnon–Haslanger analysis of discrimination as substantive disadvantages enabled by the social meaning of a presumed biological difference.

<i>Legally relevant meaning of ...</i>	<i>Sameness–differences conception</i>	<i>Inequality conception</i>
‘Discrimination’	Formalistic meaning (i.e., differential treatment)	Substantive meaning (i.e., systematic disadvantage)
‘Sex’	Biological meaning (i.e., biological difference)	Social meaning (i.e., gender)

*Gender categories.* An analytical category is gendered (for critical feminist analytical purposes) if but not only if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (present, previous, or future) body socially interpreted as sexed one way or another.

*Pregnant persons.* The analytical category *pregnant persons* consists of those who are systematically subordinated along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) body socially interpreted as pregnant.

Chapter 2, “‘Medical Diagnosis, Not Sex or Gender Identity’: Transgender Equality and the Neutral Application Loophole,” extends this analysis to trans discrimination. (A potential third chapter, “Taking Gender Seriously,” engages with leading treatments of trans equality in philosophy and jurisprudence.)

*Persons seeking gender-affirming care.* The analytical category *persons seeking gender-affirming care* consists of those who are systematically subordinated along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) body socially interpreted as gender-disordered.

## PART II: SOCIAL METAPHYSICS

**Euthyphro’s gender trouble:** The relative *explanatory* priority of our genders vs. gender identities.

*The identity-first approach* ( $\approx$  everybody): Euthyphro is a man because he identifies as a man.

*The gender-first approach* (Ding): Euthyphro identifies as a man because he is a man.

### ⚠ Caveats 📦

Explanatory priority  $\neq$  temporal priority (not “born this way”)  $\neq$  causal priority (feedback loop).

Gender- vs. identity-first  $\neq$  social position vs. personal identity (Barnes, Jenkins, etc., are identity-first).

What distinguishes any given gender-first account from its identity-first twin is a structural feature.

Both my view and my argument for it are modeled on inference to the best explanation.

**The argument from explanatory power:** We in fact have far more data about the empirical reality of gender than are recognized by current work, and that once such data are taken into account, trans people’s own interpretations of our bodies and genders come out as metaphysically privileged for the straightforward reason that they best track and explain reality.

Chapter 3, “On Our Own Terms: Trans Women Crafting the Meaning of ‘Woman,’” introduces such data and proposes a “sexy mad scientist metaphysics” approach to the metaphysics of gender on the model of inference to the best explanation.

Chapter 4, “Is Euthyphro a Man Because He Identifies as a Man?” makes the explanatory power argument and sketches a *building brick theory of gender* as the gender-first account par excellence.

A potential third chapter, “The Building Brick Theory of Gender: How Gender Is Just like Lego and What We Can Build with It,” builds out the view.

Given the myriad of ways I experience the social meaning of my embodied sex, which gender(s), or the negation thereof, may best explain who I am and how I’m situated in this world?

- a) *Trial and error*: We try on different gender identities in search of something that fits and reflects our lived relationship with gender, often accompanied by *genuine confusion* along the way and *retroactive recognition* of our earlier genders on reflection.
- b) *Lived social positions and relations*: Incarcerated trans women, for instance, face sexual and physical violence at an unfathomable rate precisely because they *are* the women in a race-, class-, gang-structured prison heterosexual economy; in turn, women find it absolutely necessary to invoke not only their trans femininity but their womanhood and explain the sexual and physical violence directed at them as violence against *women*, not gender-nonconforming gay men.
- c) *Clarifying force of fitting identities*: There must be some reason why interpreting ourselves as our lived rather than imposed genders feels so right, so fitting, so clarifying; the latest accounts of gender subjectivity from trans metaphysics *describe* this phenomenon but fail to *explain* it.

The gender-first approach offers a really natural, straightforward explanation for what's up.

What best explains our embodied gender experiences often turns out to be fine-grained, if not distanced from the three usual suspects (e.g., *dolls*, *butches*, *trans fem tomboys*, *theory dykes with an em dash problem*).

We may craft identities that diverge from our explanatory genders (e.g., butch–trans masc borders).

**The building brick theory of gender:** The gender-first approach's main challenge can be met by the specific gender-first account I favor—the building brick theory of gender.

*What is gender as an empirical phenomenon?* Gender is the *meanings* that we make out of the relevant concrete material, personal, relational, social, political, and historical situations socially given to us, on an analogy to building with Lego.

*What are our individual genders?* Our genders just are *whatever* may turn out to best explain gender reality as we live and interpret it, which we in turn figure out by inference to the best explanation.

This gives us an objective story of what our genders are that our subjective judgments can genuinely get wrong and which others may figure out before we do. And it has no trans-inclusion problem.

Often the cases are underdescribed, and often our gender identities are overriding data points.

But there are also cases where our gender identities are not and should not be dispositive of our explanatory genders (e.g., the spectrum of trans girlhood).

There are girls who've always known, girls who "don't know what's going on but nothing fucking works,"<sup>1</sup> girls who savor the delights of "genderben[ding] like it was nobody's business," girls who cope by hitting the gym "in a misguided attempt to achieve an attractiveness in the eyes of my partners that I thought unattainable to anyone but women," girls who make do with being nerds because that's "what you get when think you're a boy, don't want to be hyper masculine, and have that dysphoric shyness that accompanies so many of us,"<sup>2</sup> and lots and lots more.

Our early relationships with gender can also make it such that identifying as a boy under those circumstances really did and still does feel right all things considered, but that this is itself best explained by us having been *not boys but girls who identified as boys*.

1. Alana Storm, Review of *When Monsters Speak: A Susan Stryker Reader*, by Susan Stryker, edited by McKenzie Wark, August 31, 2024 <https://gliff.org/posts/review-of-when-monsters-speak-a-susan-stryker-reader.html>.

2. Auto Anon, "Trans Femme Masculinity," archived May 5, 2020, [https://transreads.org/wp-content/uploads/2020/05/2020-05-05\\_5eb194ee8424c\\_TransFemmeMasculinity.pdf](https://transreads.org/wp-content/uploads/2020/05/2020-05-05_5eb194ee8424c_TransFemmeMasculinity.pdf).